(22)

No. 89-390

In the Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, OFFICIAL PARENT CREDITORS' COMMITTEE OF THE LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT OFFICIAL PARENT CREDITORS' COMMITTEE OF THE LTV CORPORATION

WILLIAM H. ROBERTS
(Counsel of Record)

RAYMOND L. SHAPIRO
THOMAS E. BIRON
WILLIAM E. TAYLOR, III
ANN B. LAUPHEIMER

BLANK, ROME, COMISKY & MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500

Attorneys for the Official Parent Creditors' Committee of the LTV Corporation

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

This case involves an attempt by the Pension Benefit Guaranty Corporation ("PBGC") to restore $2.3 billion in pension plan funding obligations to a debtor in the process of reorganizing under Chapter 11 of the Bankruptcy Code and presents the following questions involving the intersection of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Bankruptcy Code:

1. Where the sponsor of a pension plan involuntarily terminated by the PBGC is a debtor reorganizing under Chapter 11, may the PBGC determine to restore the pension plan based on nothing more than

(a) application of a *per se* rule fashioned by the PBGC, but not authorized by ERISA, under which it considers all follow-on plans as "abusive" of the pension system, mandating restoration of a terminated plan without regard to the financial condition of the sponsoring employer and without regard to the impact of restoration upon the plan sponsor's ability to reorganize; and

(b) a determination, unsupported by the administrative record, that a plan sponsor's financial condition had improved sufficiently to warrant restoration of the pension funding obligations?

2. When the PBGC determines, under §4047 of ERISA, to restore a pension plan sponsored by a debtor reorganizing under Chapter 11, does the PBGC have the power to effectuate that restoration without consideration by a court to ensure that restoration is properly harmonized with the policies of the Bankruptcy Code in light of

(a) the clear Congressional expression in ERISA §4041 that pension plan status be determined and provided for in the reorganization plan and that pension plans continue unless a company cannot successfully reorganize absent termination;

(b) the clear Congressional expression in §§514(d) and 4041(c)(2)(B)(ii) of ERISA and §§1123 and 1142 of the Bankruptcy Code, that in the context of a reorganization, the bankruptcy policy favoring rehabilitation and reorganization of the debtor remains paramount to other concerns;

(c) the fact that the PBGC's authority and expertise are limited to the federal pension laws and do not extend to bankruptcy law; and

(d) the fact that the PBGC lacks the power to nullify a prior district court pension plan termination order?

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

No. 89-390

In the Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, OFFICIAL PARENT CREDITORS' COMMITTEE OF THE LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

BRIEF FOR RESPONDENT OFFICIAL PARENT CREDITORS' COMMITTEE OF THE LTV CORPORATION

This brief is filed on behalf of respondent the Official Parent Creditors' Committee of The LTV Corporation ("Parent Creditors' Committee"). The Parent Creditors' Committee is the official committee of creditors of The LTV Corporation, the parent of LTV Steel Company, Inc. ("LTV Steel"). LTV Steel is the sponsor of the three defined benefit pension plans (the "Plans"), which are at issue in this case. The Parent Creditors' Committee represents creditors of The LTV Corporation and includes indenture trustees who represent holders of over $1 billion in publicly-held debt.

The Parent Creditors' Committee believes that restoration of these three Plans may ultimately be required and, if so, that the Debtors should be reorganized according to a plan of reorganization that provides for the continuation of the Plans after confirmation. However, the Parent Creditors' Committee also contends that the courts below were correct in holding that this result cannot be achieved based on the administrative record before this Court. Instead, the Parent Creditors' Committee respectfully suggests that this matter must be remanded to the Pension Benefit Guaranty Corporation (the "PBGC"). If, after remand and on an adequate administrative record, the PBGC again determines that restoration is warranted, the effect of restoration on the Debtors' ability to reorganize must be considered, in a second step, by the appropriate court before any restoration determination can be implemented.

COUNTER-STATEMENT OF THE CASE[1]

This case arises out of bankruptcy reorganization proceedings under Chapter 11 of the Bankruptcy Code, filed in the United States District Court for the Southern District of New York. The decision of the Court of Appeals for the Second

[1] References to the Appendix to the Petition for a Writ of Certiorari filed by the PBGC are denoted as "Pet. App.__ a". References to the Joint Appendix are denoted as "JA__". References to the Brief of Petitioner, Pension Benefit Guaranty Corporation, are denoted as "PBGC Br.__." References to the Brief of the United States as *Amicus Curiae* are denoted as "U.S. Br.__." References to the administrative record of the PBGC's restoration decision, contained as exhibits in the joint appendix filed in the court of appeals, which are not contained in the Joint Appendix here, are denoted as "AR __."

Circuit under review here involves the disposition of approximately $2.3 billion in unfunded pension benefit obligations owed to present and former employees of LTV Steel and its predecessor steel companies under several defined benefit pension plans.[2]

A. The Debtors.

The LTV Corporation ("LTV Corp.") directly and indirectly holds all, or a portion of, the issued and outstanding stock of a number of subsidiaries, including LTV Steel. As a result of significant operating losses sustained by LTV Steel and mounting pension obligations that LTV Steel owed to its current and former employees, LTV Corp. and sixty-six of its subsidiaries (the "Debtors"), including LTV Steel, filed voluntary Chapter 11 petitions under the Bankruptcy Code in July and August 1986. Pet. App. 37a. Although these bankruptcy reorganization cases are being jointly administered in the United States Bankruptcy Court for the Southern District of New York by the Honorable Burton R. Lifland, Chief Judge, these 67 separate cases have not been substantively consolidated. *See* Fed. R. Bankr. P. 1015(b).

Since the filing of the petitions, the Debtors have enjoyed the exclusive right to file plans of reorganization pursuant to 11 U.S.C. §1121(b). Eleven orders entered by the bankruptcy court, under 11 U.S.C. §1121(d), have extended the initial 120-day period of exclusivity. Throughout the period of exclusivity, as extended, the Debtors have

[2] LTV Steel was created by the merger of Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation. Pet. App. 36a.

been unable to formulate a plan of reorganization that has attracted sufficient support to warrant solicitation for a vote on creditor and equity holder acceptance. Consequently, no plans of reorganization have been filed. A major impediment to formulation of an acceptable plan has been the uncertainty concerning LTV Steel's unfunded pension obligations.

B. The Bankruptcy Cases And The Creditor Constituencies.

In these bankruptcy reorganization cases, the interests of creditors of the parent, LTV Corp., have diverged in many respects from the interests of creditors of the subsidiary, LTV Steel. In particular, the parent creditors have differed from the steel creditors in their position with respect to the PBGC's determination to restore three of LTV Steel's pension plans – the issue before this Court. Initially, a single creditors' committee was appointed for all of the cases, representing, *inter alia*, trade, labor, publicly-held debt, utility and insurance company interests. Recognizing the diverging interests among the various creditors, the bankruptcy court by Order dated December 23, 1988, approved a Stipulation among the Official Committee of Unsecured Creditors, a subcommittee of Parent Creditors within that Official Committee, and the Debtors, bifurcating the single Committee into an official Parent Creditors' Committee and an official Steel Creditors' Committee.[3]

[3] The Official Committee of Unsecured Creditors, as designated in the caption, now represents only the interests of the creditors of LTV Steel and certain steel affiliates.

In addition to the Parent Creditors' Committee, four other major creditor constituencies in these Chapter 11 cases are also parties to this proceeding: (1) the Steel Creditors' Committee, which represents creditors of the subsidiary that is the plan sponsor, LTV Steel; (2) the Equity Security Holders' Committee, which represents the equity security holders of LTV Corp.; (3) the LTV Bank Group, which holds the majority of the debt (approximately $250 million) at LTV Aerospace & Defense Company, another subsidiary of LTV Corp.; and (4) the PBGC, which has asserted a termination liability claim in excess of $2 billion in each of the 67 bankruptcy cases. The PBGC is a wholly-owned United States government corporation that was established in §4002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1302, to insure pension benefits under terminated pension plans and to administer the provisions of Title IV of ERISA, which creates a pension plan termination insurance system.

In multi-debtor bankruptcy reorganization cases, a particular aspect of a reorganization plan may have a different impact upon one debtor than upon another, and therefore may have a different impact upon their respective creditors. Restoration of LTV Steel's pension plans, and the potentially disparate impact of the "joint and several liability" provisions of ERISA, as amended, provides an example. In May 1988, after the PBGC had instituted this enforcement action, the Debtors submitted to the major constituencies a plan of reorganization proposal which completely ignored

PBGC's determination to restore LTV Steel's pension plans. The Steel Creditors' Committee has supported the Debtors' reorganization proposal. The Parent Creditors' Committee has rejected that proposal. Thereafter, the Parent Creditors' Committee submitted to the Debtors and to the Steel Creditors' Committee a separate plan of reorganization proposal. The touchstone of the Parent Creditors' Committee's proposal is the restoration of the pension plans on an affordable basis to permit LTV Steel to fund necessary contributions to the Plans.

Pension-related issues aside, considerable activity in the bankruptcy reorganization cases continues under the careful supervision of the bankruptcy judge while this proceeding has progressed. No trustee having been appointed, the Debtors, as debtors-in-possession, have continued to operate their businesses. *See* 11 U.S.C. §§1107, 1108. The Debtors, and most notably LTV Steel, have continued their business plan to rationalize and dispose of excess and unprofitable businesses, operations, and assets, under the supervision of the bankruptcy judge, who has been involved with these cases continuously since the bankruptcy filings and their automatic referral. *See* 28 U.S.C. §157(a). Indeed, since these cases were filed and as of September 30, 1989, the Debtors have on a consolidated basis accumulated and invested approximately $1 billion in cash or cash equivalents—approximately $240 million more than they had on September 30, 1988.

Moreover, the Debtors have continued the effort to resolve or litigate before the bankruptcy

judge the many disputes that have arisen affecting the property of the estate (11 U.S.C. §541) and its turnover (11 U.S.C. §542); requests for relief from the automatic stay (11 U.S.C. §362); the imposition of liens, including statutory liens (11 U.S.C. §§544, 545) and adequate protection to lienholders (11 U.S.C. §361); the use, sale, or leasing of property (11 U.S.C. §363); the disposition of executory contracts and obligations thereunder (11 U.S.C. §365); and objections to proofs of claim filed in these cases (11 U.S.C. §§501-503, 506, 1111).

The bankruptcy judge has supervised extensive activity relating to disputed and settled claims against the Debtors. According to the Debtors, initially 37,267 proofs of claim amounting to billions of dollars were filed. After subtracting excess multi-case claims (including those of the PBGC for termination liability), and settled, withdrawn, overlapping, and duplicative claims, 10,431 claims are in agreement, and 9,748 claims remain in active discussion or litigation.

The bankruptcy judge has also exercised his broad equitable powers to protect the parties' competing interests and to foster a process and environment conducive to the negotiation of a consensual plan of reorganization. Thus, in several instances, the bankruptcy judge has entered orders enjoining lawsuits in other forums and directing actions to be taken or not taken. The bankruptcy judge has dealt with many issues that have arisen that may affect the reorganization effort and the rehabilitation of the Debtors in order to preserve the Debtors' estates for a distribution to creditors in accordance with and subject to the

priorities established by Congress in the Bankruptcy Code. The bankruptcy court has entered, *inter alia*, two significant interim orders to preserve the Debtors' estates, utilizing the mechanism of 11 U.S.C. 105(a)[4] and the bankruptcy court's inherent equitable powers. By order entered July 30, 1986, the bankruptcy judge authorized LTV Steel to restore retiree health and life insurance benefits of up to $70 million for a six-month period to "reduce the threat to the reorganization posed by [a labor] strike." *In re Chateaugay Corp.*, 64 Bankr. 990, 996 (S.D.N.Y. 1986). *See* Pet. App. 46a. The bankruptcy court also permitted LTV Steel in April 1987, after the PBGC terminated the Plans, to make "a single hardship payment to each retiree at a cost of $6.7 million" in response to the adversary proceeding initiated by the United Steel Workers of America seeking to compel payment of full pension benefits. Pet. App. 43a-44a.

C. The District Court's January 12, 1987 Orders Relating To Involuntary Termination Of Three LTV Steel Pension Plans.

On January 12, 1987, six months after the Debtors' bankruptcy petitions were filed, the PBGC elected to start proceedings to terminate three defined benefit pension plans for which LTV Steel was the sponsoring employer. Pet. App. 7a.[5]

[4] Section 105(a) of the Bankruptcy Code provides, in part, that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a).

[5] Under ERISA §§4041 and 4042, 29 U.S.C. §§1341 and 1342, an employer may terminate a pension plan "voluntarily" or the PBGC may take action to terminate a plan "involuntarily". Voluntary terminations are either "standard", where the assets of the plan are sufficient to pay all benefit commitments, or "distress", where the assets are insufficient to pay all benefits. *See* 29 U.S.C. §1341. The PBGC may start proceedings to terminate a plan under a variety of circumstances, including situations where plan assets are insufficient, where the employer fails to make minimum funding contributions, where the PBGC may sustain a long-run loss, or where the plan will be unable to pay the defined benefits when they become due. *See* 29 U.S.C. §1342.

At that time, the PBGC advocated termination of the plans for the purpose of "avoid[ing] an unreasonable deterioration of the plans' financial condition or an unreasonable increase in the liability of the PBGC's insurance funds." Memorandum In Support Of PBGC's Motion For Summary Judgment On Its Complaint, at 10; Pet. App. 41a-42a; JA 313. LTV Corp. and LTV Steel consented to the involuntary terminations. JA 141-42. The district court's January 12, 1987 consent orders terminated the Plans as of January 13, 1987. JA 141-42. The PBGC estimates the underfunding of the Plans, as of the date of termination, at $2.3 billion. PBGC Br. at 8.

Pursuant to the terms of ERISA, the PBGC assumed its statutory duty to pay certain guaranteed benefits to plan participants. Pet. App. 7a.[6] ERISA authorized the PBGC to assert claims against LTV Steel and its "controlled group of corporations" (including LTV Corp.) for 75% of the unfunded guaranteed benefits.[7] Accordingly, the

[6] "Guaranteed benefits" refers to the level of benefits guaranteed by the PBGC. *See* ERISA, §4022, 29 U.S.C. §1322. To the extent that a plan promises benefits in excess of guaranteed amounts, employees may lose a portion of their benefits upon termination. PBGC Br. at 5-6; Pet. App. 7a.

[7] *See* ERISA §§4062(a) and (b), 29 U.S.C. §§1362(a) and (b), as amended by the Single Employer Pension Plan Amendments of 1986 ("SEPPAA"), Pub. L. No. 99-272, Title XI, 100 Stat. 268,

PBGC filed proofs of claim exceeding $2 billion in each of the 67 bankruptcy reorganization cases on the theory that each debtor was jointly and severally liable for the full termination liability.

By filing these proofs of claim, the PBGC became the largest single creditor in these bankruptcy reorganization cases. JA 138, 337.

D. The PBGC's Determination To Restore The Plans.

Seven months later, on September 22, 1987, without proceeding further in the district court which had entered the termination order, the PBGC issued a Notice of Restoration in which it purported to return to LTV Steel the $2.3 billion in pension benefit obligations under the Plans. Pet. App. 182-83a.

This Notice of Restoration – the first such Notice the PBGC had ever issued – stated:

NOTES *(Continued)*

§11011(a), 29 U.S.C. §§1362(a) and (b) (Supp. IV 1986). These sections impose joint and several termination liability on members of a sponsoring employer's "controlled group" of corporations. The determination of which corporations are included in the "controlled group" depends on a calculation of ownership percentages taken from §1563(a) of the Internal Revenue Code, 26 U.S.C. §1563(a). *See* ERISA §4001(a)(14), 29 U.S.C. §1301(a)(14). In 1987, Congress amended ERISA to eliminate the 75% cap that existed under previous law on the liability of a sponsoring employer and its controlled group upon termination of a pension plan covered under the statute. *See* The Pension Protection Act of 1987 ("PPA"), Pub. L. No. 100-203, Title IX, subtitle D, part II, 101 Stat. 1330-333 (1987). With respect to plans that terminate *after* December 17, 1987, ERISA provides that the PBGC may assert a termination liability claim against a plan sponsor and its controlled group for the total amount of the unfunded benefit liabilities, without regard to any cap. *See* ERISA §§4062(a) and (b), as amended by the PPA, 29 U.S.C. §§1362(a) and (b) (West Supp. 1988).

Please take notice that the Pension Benefit Guaranty Corporation (the "PBGC") has determined, pursuant to Section 4047 of the Employment Retirement Income Security Act of 1974, as amended ("ERISA"), that it is appropriate and consistent with PBGC's duties under Title IV of ERISA to restore to pretermination status the Jones & Laughlin Hourly Pension Plan, the Jones & Laughlin Retirement Plan and Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (the "Plans"). *This determination is based on three factors: LTV Steel's establishment, after the termination of the Plans, of a retirement program that results in an abuse of the pension plan termination insurance system established by Title IV of ERISA; LTV Steel's improved financial circumstances; and LTV Steel's demonstrated willingness to fund employee retirement arrangements.*

The Plans are hereby restored, effective immediately, to their pretermination status as of January 13, 1987. This means that the Plans are ongoing since that date for all purposes, including accruing of benefits, vesting, and minimum funding obligations. Benefit payments to retirees that were reduced because of the terminations shall be restored to their full amounts under the terms of the Plans, and the Plans shall pay to such retirees any amounts that were not paid because of the terminations, together with interest at the rate specified in 29 C.F.R. §2623.11(d).

Payments to retirees may not be delayed or withheld as a result of restoration. The Plans

currently have sufficient cash to make the next five scheduled benefit payments without liquidation of assets.

> Also effective immediately, The LTV Corporation is plan administrator of the restored Plans with all of the fiduciary duties and obligations of a plan administrator under ERISA and under the terms of the Plans.
>
> *This determination is effective on the date and at the time it is issued and is not subject to administrative review by the PBGC under 29 C.F.R. Part 2606.*

Id. (Emphasis added)[8]

The Debtors refused to accept the restoration. The PBGC then instituted an action in the United States District Court for the Southern District of New York to enforce restoration, relying upon §4003 of ERISA, 29 U.S.C. §1303. Pet. App. 9a.

E. The District Court Decision.

By opinion dated June 22, 1988, the district court vacated the PBGC's Notice of Restoration and remanded the case to the PBGC. Pet. App. 28a-131a. The court held that the administrative record "[did] not support the PBGC's decision to restore the Plans on any of the asserted grounds." Pet. App. 35a. The court also held that there was "no factual or legal basis for the PBGC's finding that LTV has abused the pension termination insurance program." *Id.* The district court stated that the record "is not sufficiently developed to

[8] Emphasis supplied throughout unless otherwise indicated.

permit a finding that LTV Steel's financial condition has improved to the point where it can afford to sponsor its previously terminated plans." *Id.*

Applying the standard of review prescribed in the Administrative Procedures Act ("APA"), 5 U.S.C. §706(2)(A), the district court held that the PBGC's determination to restore the three pension plans was arbitrary and capricious. Pet. App. 82a-85a. The court concluded that Congress did not intend restoration to be used as a weapon to retaliate against an employer that institutes a post-termination replacement benefit plan. Pet. App. 90a-110a.

The court also held that the PBGC's determination that LTV Steel's interim collective bargaining agreement, which established several new so-called "follow-on" pension plans[9] for employees of LTV Steel, was "abusive" could not be sustained because it failed to take into consideration the competing policies of the Bankruptcy Code and the federal labor laws. Pet. App. 110a. Noting that the record did not fully support the PBGC's statement that LTV Steel's financial performance had truly been a factor in the restoration determination, the district court held that the administrative record nonetheless did not support a conclusion that LTV Steel's financial condition had improved substantially enough to allow it to afford restoration. Pet. App. 110a-118a. Finally, the district court found the PBGC's restoration procedures inadequate because of "the PBGC's failure to develop a complete,

[9] A "follow-on" pension plan is a pension plan established by an employer after the termination of a pre-existing pension plan, where the new plan replaces at least some of the benefits lost by employees by reason of the plan termination.

reviewable record, its failure adequately to apprise LTV of the grounds for restoration and its failure to give LTV adequate opportunity to rebut those grounds." Pet. App. 123a.

F. The Court Of Appeals Decision.

The Court of Appeals for the Second Circuit affirmed, agreeing with the district court's conclusion that the PBGC's restoration determination was arbitrary and capricious. Pet. App. 14a-17a.

Relying on this Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971), holding that an agency must consider "all relevant factors," the court held that "[b]ecause ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of law, and, to the extent possible, honored the policies underlying them." Pet. App. 14a-15a. It concluded that the PBGC had not "adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other." Pet. App. 17a. Rather, PBGC "focused inordinately on ERISA." *Id.*

Alternatively, the court held that the PBGC's analysis under ERISA, without regard to competing federal policies, was "insupportable as a matter of law." *Id.* First, the court found no support for the PBGC's adoption of a *per se* rule that the establishment of a follow-on plan by itself is a sufficient basis for restoration, noting that Congress was consistent in its refusal to include in ERISA proposed provisions outlawing follow-on plans. Pet. App. 17a-20a. The court of appeals also

agreed with the district court that the PBGC's assessment of LTV Steel's improved financial condition was seriously flawed and could not support restoration. Pet. App. 21a-25a. Finally, the court of appeals agreed that the PBGC utilized inadequate procedures.

The court of appeals remanded to the PBGC, explaining that "[o]n remand, PBGC may be able to justify its decision. However, based on the administrative record presented to the district court and to us, its decision cannot be upheld." Pet. App. 27a.

G. The Impact Of Restoration.

The status of the three Plans – terminated or restored – and the disposition of approximately $2.3 billion in unfunded pension benefit obligations affects all creditors of LTV Corp. and LTV Steel, as well as creditors of all the other Debtors. Assuming LTV Steel could afford to fund restored Plans while it and the other members of its controlled group successfully reorganize, the goals both of ERISA and of the federal bankruptcy laws would be achievable. However, an improvident restoration – one in which the impact of LTV Steel's funding obligations on the prospects of reorganization of all of the Debtors has not been properly evaluated – could well lead to imminent retermination of the Plans and the liquidation of all Debtors. Liquidation would frustrate the goals of ERISA, the Bankruptcy Code and the labor laws.

Retermination of the Plans could also have a drastic, adverse effect on all creditors in these bankruptcy reorganization cases. The 1987 amendments to the pension laws increased the

joint and several liability of terminated plan sponsors and their controlled group of corporations (which here includes the parent, LTV Corp. and LTV Aerospace & Defense Company), from 75% of unfunded guaranteed benefits to 100% of benefit liabilities. *Compare* SEPPAA, §11011(a), amending ERISA §4062(b), 29 U.S.C.A. §1362(b)(1)(A) (Supp. IV 1986) with the PPA, amending ERISA §4062(b), 29 U.S.C.A. §1362(b)(1)(A) (West. Supp. 1988). Were the PBGC to reterminate these pension plans, or were the bankruptcy court to approve a voluntary distress termination after the restoration, the PBGC might seek to increase its claim to 100% of the unfunded benefit liabilities. If the court found that the new law applied, the PBGC's claim would be increased by approximately $800 million. Pet. App. 121a. Although the Plans in question are sponsored by LTV Steel – not LTV Corp. – the prospects of recovery by parent creditors may be seriously affected by the provisions in ERISA that provide for "joint and several" liability of members of the controlled group on a termination claim.[10]

A decision by this Court as to the status of the Plans affects the interests of all LTV Corp.'s and LTV Steel's creditors, but that decision may affect each creditor constituency differently.

[10] In the bankruptcy court, the Parent Creditors' Committee objected to the PBGC's claims. These objections, which are still pending, raise the issue whether such full controlled group liability on the parent LTV Corp. violates the constitutional rights of LTV Corp. and its creditors.

SUMMARY OF ARGUMENT

1. The administrative record does not support the PBGC's Notice of Restoration of the Plans, and the courts below correctly vacated the PBGC's Notice and remanded the matter to the PBGC for further development of the factual record. An employer's adoption of a follow-on plan does not automatically justify restoration by the PBGC of a terminated plan. Congress carefully considered and explicitly rejected a proposed statutory prohibition against follow-on plans, and withheld from the PBGC the power to adopt such a "per se" rule and to use retaliatory restoration to deter this supposed "abuse" of the pension insurance program. Moreover, the courts below were correct in concluding that the PBGC's optimistic assessment of LTV Steel's financial condition was not based on an adequately-developed administrative record.

2. On remand to the PBGC, however, the PBGC should confine its consideration exclusively to the issues under ERISA involved in restoration. When the sponsor of a terminated pension plan is a debtor in the process of reorganization under Chapter 11 of the Bankruptcy Code, and pension plan obligations are a part of a collective bargaining agreement governed by the federal labor laws, the decision to give effect to restoration of the pension plan requires careful consideration by a tribunal that is familiar with the delicate and complex process of bankruptcy reorganization, of the competing and often inconsistent policies of ERISA and the purposes and mechanics of reorganization under the Bankruptcy Code.

The PBGC has neither the statutory authority nor the expertise to apply ERISA in a fashion that properly effectuates the competing, non-ERISA federal policies. On the contrary, even in the context of a Chapter 11 bankruptcy case, the PBGC may "determine" to restore solely according to ERISA standards.

The Parent Creditors' Committee concurs with the Solicitor General's suggestion that the PBGC lacks statutory authority to evaluate non-ERISA concerns in making a restoration determination. U.S. Br. at 13, 20. Therefore, in the context of the bankruptcy reorganization process, the PBGC's determination is neither self-executing, nor conclusive. Only the courts possess the statutory authority and expertise to harmonize the goals of ERISA, the federal bankruptcy laws and the federal labor laws and to give appropriate effect to a restoration determination by the PBGC in the context of a bankruptcy reorganization case under Chapter 11. Moreover, in a case such as this, where the district court has entered an order terminating a pension plan, the PBGC has no authority to undermine and contradict a prior district court termination order by unilaterally ordering restoration. Again, action by the court to vacate the prior order is required fully to implement the PBGC's restoration determination.

3. As both the PBGC and the Solicitor General concede, the standard articulated in ERISA §4041(c)(2)(B)(ii) embodies Congress' statutory harmonization of bankruptcy and ERISA concerns when a Chapter 11 debtor seeks to terminate a pension plan. Here, where the Debtors oppose

restoration and contend that the Plans should remain terminated, the same standard is applicable. Section 4041(c)(2)(B)(ii) expresses Congress' intent that pension plans continue in effect during and "ride through" the bankruptcy reorganization whenever possible. Only if the court finds that the restored pension plan obligations cannot be made a part of any successful reorganization plan, *i.e.*, one which will allow the debtors to pay their debts as restructured by and pursuant to a plan of reorganization and continue in business outside the Chapter 11 reorganization process, should a previously terminated pension plan remain terminated. Conversely, if there is a confirmable plan of reorganization that contemplates restoring the pension plans, and the PBGC, in compliance with ERISA guidelines, determines to restore, the court must confirm that plan over an alternative plan that does not provide for restoration.

I. THE COURTS BELOW CORRECTLY VACATED THE PBGC'S RESTORATION DETERMINATION.

Applying the standard set forth in the APA, 5 U.S.C. §706(2)(A),[11] the court of appeals held that

---

[11] Although the PBGC does not clearly articulate the standard of review it advocates, it cites *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). PBGC Br. at 18. In *Chevron*, which dealt with the deference to be given to an administrative agency's interpretation of a statute when the statutory scheme is ambiguous or silent, the Court stated that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. at 843-44. The Court said that if the legislative delegation is implicit rather than explicit, "a

the PBGC acted arbitrarily and capriciously in making a determination to restore LTV Steel's three, previously-terminated pension plans. The court concluded that the PBGC acted arbitrarily and capriciously in basing restoration on the fact that LTV Steel's interim labor agreement replaced some of the benefits lost as a result of termination and in fashioning a *per se* rule that replacement of benefits constitutes an "abuse" of ERISA's pension termination insurance program sufficient by itself to justify restoration. The court of appeals also concluded that the PBGC's finding that LTV Steel's and LTV Corp.'s[12] financial condition had improved sufficiently to allow them to fund restoration was unsupported by the administrative record. In addition, the court of appeals based its decision on the PBGC's failure adequately to consider competing federal bankruptcy and labor law policies.

NOTES *(Continued)*

court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Thus, if the agency's interpretation is either arbitrary or capricious or unreasonable, it may be overturned.

In *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1861 n.23 (1989), the Court noted that "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence." Accordingly, whether the Court applies the *Chevron* standard or the "arbitrary and capricious" standard under the APA is of little practical significance here.

[12] Although the court of appeals in its opinion referred to LTV Corp. and LTV Steel collectively as "LTV" and the briefs of both the PBGC and the United States in this Court perpetuate this confusion, the separate corporate existence of LTV Corp. and LTV Steel is important to observe in the context of these bankruptcy reorganization cases because of the distinct statutory obligations and the differences in the composition of the creditors of the respective members of the corporate group.

The courts below correctly invalidated the PBGC's Notice of Restoration based on the first two grounds, which, considered together or independently, warrant affirmance of the judgment on review by this Court.

A. The PBGC's Conclusion, That The LTV Steel Interim Collective Bargaining Agreement Was "Per Se" Abusive Of The Pension Termination Insurance Program And Therefore Justified Restoration, Was Unreasonable.

As the PBGC frames the question presented in this case, the issue is whether "a reviewing court [may] foreclose the [PBGC] from considering whether restoration is appropriate to remedy abuse of the federal pension insurance program." PBGC Br. at (i). Clearly, this is not the issue.[13]

[13] Although the PBGC and the United States have also identified as an issue the question whether LTV Steel pension liabilities are "pre-petition debts" enjoying "no special priority," or administrative expenses under 11 U.S.C. §503(b), entitled to first-level priority under 11 U.S.C. §507(a)(1), See PBGC Br. at 37-38, U.S. Br. at 22-23, n.18, and have referred to confusing language in the court of appeals' decision, Pet. App. 23a-24a, this court does not have before it any issue concerning the priority of whatever claims exist or may arise, whether on terminated plans or restored plans. The Parent Creditors' Committee would dispute the Debtors' argument that restoration is meaningless because LTV Steel cannot make contributions while it is in the process of reorganization before confirmation of a plan of reorganization "without an extraordinary court order," *See* Brief for Appellees, the LTV Corporation, The LTV Steel Company, Inc., *et al.* in No. 88-6244 (2d Cir.), pp. 40-41, n. **, and takes issue with the Debtors' refusal in December 1986, to make contributions to the Plans because LTV Steel "is currently in reorganization under Chapter 11 of the Bankruptcy Code." JA 125-126.

Nonetheless, these questions and the many subsidiary issues flowing from them are not properly before this Court. Although these issues are important to bankruptcy administration in these and other cases, the bankruptcy court here has not yet definitively dealt with them. This Court should avoid addressing these issues prematurely before the courts below have had a full opportunity to

Neither the court of appeals nor the district court held that the PBGC was precluded from restoring a pension plan when an "abuse" had occurred. Indeed, if an employer "abuses" the system by shifting to the federal pension insurance program liabilities that the employer can actually afford, the decisions of the courts below would not prevent the PBGC from determining that restoration is appropriate. Moreover, in considering restoration and in evaluating an employer's ability to fund a pension plan, the PBGC is not foreclosed by anything in the decisions of the lower courts in this case from considering the cost of a follow-on plan. The employer's willingness and ability to pay the cost of such a follow-on plan is clearly one relevant fact to consider in determining whether an employer has the financial capability to fund the entire plan in its original form.

Rather, the question presented here is whether PBGC has erroneously fashioned and applied a *per se* rule that whenever a sponsoring employer, after it has terminated a pension plan, adopts a follow-on plan that substantially replaces nonguaranteed benefits, such a follow-on plan constitutes an abuse and whether, under such circumstances, ERISA §4047 confers upon the PBGC the power to restore the original pension plan. *See,*

NOTES *(Continued)*

explore them. However, in view of the confusion engendered by certain language in the court of appeals' opinion, this Court may wish to invite the court of appeals on remand to clarify its discussion of these issues, in which it appears to have blurred the crucial distinction between statutory termination liability claimed by the PBGC and post-petition contributions payable by a sponsoring employer to ongoing pension plans.

e.g., PBGC Br. at 23. Under the PBGC's construction of §4047, the PBGC need consider neither the employer's ability to fund the plan nor any of the other considerations upon which the previous involuntary termination of the plan rested.

The PBGC's unreasonable interpretation of §4047 was properly rejected by both the district court and the court of appeals below.

1. The Courts Below Correctly Rejected As Unreasonable The PBGC's Contention That ERISA §4047 Authorizes Restoration As A Sanction For Adoption Of A Follow-On Plan.

Section 4047 of ERISA provides that the PBGC may "take such actions as may be necessary to restore" a terminated pension plan where the PBGC "determines such action to be appropriate and consistent with its duties" under ERISA.[14]

[14] Section 4047 of ERISA, 29 U.S.C. §1347, provides:

Whenever the corporation determines that a plan which is to be terminated under section 4041 or 4042, or which is in the process of being terminated under section 4041 or 4042, under this subtitle should not be terminated under section 4041 or 4042 as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 4041 or 4042. *In the case of a plan which has been terminated under section 4041 or 4042, the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.*

The duties of the PBGC under ERISA, as enumerated in §4002(a), 29 U.S.C. §1302(a) are:

(1) "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,"

(2) "to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies," and

(3) "to maintain premiums established by the corporation under section 4006 at the lowest level consistent with carrying out its obligations under this title."

ERISA also imposes other duties on the PBGC. These include involuntary termination of single-employer pension plans under certain circumstances. ERISA *requires* the PBGC to terminate a plan when "the plan does not have assets available to pay benefits which are currently due under the terms of the plan." *See* ERISA §4042(a), 29 U.S.C. §1342(a). It gives the PBGC the authority to terminate a plan when "the plan will be unable to pay benefits when due" or when "the possible long run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." *Id.*

When it started proceedings to terminate the three Plans at issue in this case, the PBGC found that LTV Steel was unable to meet ERISA's minimum funding standards, that without termination the severe underfunding of the Plans would increase, and that termination was required to

"avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the liability of the PBGC." Pet. App. 42a. *See* PBGC Br. at 9; JA 140; AR 1257, 1384, 1507. Thus the PBGC determined that it is appropriate and consistent with its duties to terminate pension plans under those circumstances.

In light of its own stated reasons for terminating the Plans, the PBGC's contention that restoration is justifiable, without more, simply as a deterrent measure to discourage the establishment of follow-on plans, and particularly without regard to the continued cogency of the original reasons justifying termination, is unfounded. Retaliatory restoration under such circumstances is clearly not "appropriate and consistent with [the PBGC's] duties" under ERISA, which include assuring that funding occurs and that its own liability is minimized.

2. The Legislative History Of ERISA §4047 Refutes The PBGC's Contention That Congress Intended To Entrust The PBGC With The Power To Deter Follow-On Plans With The Sanction Of Restoration.

The legislative history of ERISA §4047 shows that Congress was concerned with the financial ability of employers to fund pension plans. As the court of appeals observed, "Congress' focus in enacting section 4047 was mandating restoration if there was an improvement in financial circumstances." Pet. App. 17a. Congress intended the PBGC to take steps to restore a plan when the employer could afford to fund the terminated plan. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin.

News 5038, 5157-58. In such cases, the original grounds for termination no longer exist. The court of appeals correctly observed that the "legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration." Pet. App. 17a.

As the courts below both correctly observed, Congress only specifically identified the employer's improved financial condition as an appropriate basis for restoration under ERISA. Pet. App. 17a-18a, 93a-100a. Reporting on the original provisions of ERISA in 1974, the House Conference Report states, for example, that the PBGC may cease termination proceedings "if the employer and plan enjoyed a favorable reversal of business trends, or if some other factor made termination no longer advisable." H. R. Conf. Rep. No. 1280, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157. According to the House Report, the PBGC may restore a terminated plan "if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent." *Id.* at 5158.

The legislative history of the 1986 amendments to ERISA, which contained technical changes to §4047, likewise confirms that Congress neither intended to permit the PBGC to employ restoration as a weapon to punish employers who "abused" the termination insurance program, nor expressed the view that follow-on plans constituted an abuse. In the House Report on SEPPAA, Congress specifically identified the anticipated abuses of the insurance system which it believed

warranted legislative action and discussed the appropriate protection against such abuses. H. Rep. No. 241, 99th Cong. 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 690-700. Significantly, this crucial piece of the legislative history of §4047 does not so much as identify follow-on plans as an abuse. Nor does it provide any indication that Congress intended to authorize the PBGC to use its power to make a restoration determination to deter any of the abuses it specifically identified.

When Congress addressed the abusive shifting of pension liabilities on the PBGC, it stated that this practice should be remedied through the new "objective criteria for employer distress" and the increase in underfunding liability to the PBGC in §4062(b) above the 30% net worth cap contained in the old law. *Id.* at 690. The House Report states "these provisions will help close the door to abusive claims against the termination insurance program." *Id.* at 690. In fact, in the course of enacting the 1987 amendments to ERISA, Congress specifically considered prohibiting replacement plans, but *declined to do so. See, e.g.,* House Conf. Rep. No. 495, 100th Cong., 1st Sess., *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1626 through 1631.

In 1987, four Congressional committees considered and recommended legislation dealing with Title IV of ERISA. Only the House Ways and Means Committee suggested legislation prohibiting replacement plans. The Ways and Means Committee noted that "*[u]nder present law, an ongoing entity* can continue in operation on a profit making basis after transferring liability to the PBGC and

. . . *may continue or attempt to establish a plan . . . designed to provide the same benefits as the terminated plan less the benefits paid by the PBGC.*" Report of the Committee on the Budget, House of Representatives, to Accompany H. R. 3545, together with Supplemental, Additional, and Minority Views, 100 Cong., 1st Sess. (October 26, 1987), p. 1010. *See* Pet. App. 98a. Its proposal would have prohibited replacement plans following a *voluntary* distress termination and would have allowed the PBGC to bring an enforcement action. Its proposal was rejected.

No committee recommended a prohibition on replacement plans following an *involuntary* termination.

Congress' specific rejection of any prohibition against replacement plans and the Ways and Means Committee's recognition that "current law" permitted follow-on plans both clearly show that Congress did not consider follow-on plans sufficiently abusive to require legislative attention. The court of appeals correctly interpreted Congress' action by concluding that Congress did not intend to permit the PBGC to employ restoration as a weapon to punish an employer for establishing a replacement plan. Under similar circumstances, this Court has found Congress' subsequent legislative inaction "instructive" with respect to the meaning of an existing law. *See Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 837 n.12 (1983). Moreover, although subsequent legislative history may be ambiguous in some circumstances, this Court has suggested that subsequent legislative history may be significant when coupled with a "clear statement as to Congress' view of then existing law." *United States v. Price*, 361 U.S. 304, 312-13 (1960). *See Bradley v. Richmond School Bd.*, 416 U.S. 696, 716 n.23 (1974). Even without such a clear statement, this Court routinely relies on subsequent legislative history as an aid in statutory construction. *See, e.g., Atkins v. Rivera*, 477 U.S. 154, 166 n.10 (1986); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 32-33 (1982).[15] In sum, as the courts below correctly held, the PBGC is free to consider the establishment of follow-on plans as one factor in determining whether restoration is appropriate under ERISA §4047. However, it is evidence only of a plan sponsor's financial ability to maintain the plan as a whole, not of "abusive" behavior that alone warrants restoration.[16]

---

[15] The PBGC's contention that its "policy" that restoration would result from "abusive" follow-on plans was widely known, and therefore must have been considered and implicitly endorsed by Congress, is unfounded. This "policy" was included in three opinion letters concerning *voluntary* terminations. No such policy had ever been articulated with respect to *involuntary* terminations such as this one, and, until this occasion, the PBGC had never pursued restoration based on the establishment of a follow-on plan. Obviously, under these circumstances, Congress could not be presumed to have known and approved of this policy.

[16] It is an abuse for a plan sponsor to terminate a pension plan, thereby shifting the obligations thereunder to the PBGC, when the sponsor has the financial capability to maintain the plan. The government suggests that employers can "force" the PBGC to involuntarily terminate plans by refusing to make contributions. U.S. Br. at 22. However, the government should not, and need not, allow a sponsoring employer to *force* an involuntary termination. In a case such as this, where LTV Corp. and LTV Steel stated that they would no longer fund the plans (JA 125-126), the government has an adequate remedy short of involuntary termination by the PBGC. If the government believes a sponsoring employer can afford to fund a

B. The PBGC's Conclusion That The Financial Condition Of LTV Corp. And LTV Steel Had Improved Substantially Enough To Enable Them To Afford To Fund The Plans Was Not Adequately Supported By The Administrative Record

It is not disputed that actual improvement in financial circumstances, showing that a plan sponsor can afford to maintain and fund a plan, may justify restoration. Indeed, on a fully-developed record, the PBGC may find that the financial grounds for termination in this case no longer exist and that restoration is warranted based on the financial condition of LTV Steel.

The PBGC's reliance on the improved financial condition of LTV Corp. and LTV Steel in this case, however, was misplaced. Given the PBGC's statement of the questions presented in this case, and in view of the PBGC's administrative record, it appears that the PBGC would have restored the Plans solely because the employer established the follow-on plans, and without regard to improved financial condition.[17]

NOTES *(Continued)*

plan, the Secretary of Labor may initiate an action under ERISA §502, 29 U.S.C. §1132 to *compel* funding of a plan. That would have been a more appropriate and less disruptive approach here, in light of LTV Steel's faulty legal conclusion that the bankruptcy filing prevented it from funding the Plans. JA 125-126. *See supra* note 13.

[17] As the district court found, "[t]he Record partially belies the PBGC's contention that an alleged improvement in LTV Steel's financial improvement was an important factor in the restoration. An early draft of an Executive Summary dated September 18, 1987, concerning the SEPPAA Working Group recommendation to restore the Plans states, 'During their deliberation on this matter, the members of the working group indicated that they would have recommended restoration in response to LTV's abuse of the pension insurance system, whether or not the company's financial circumstances had changed.' In the final draft of this Executive Summary, which was forwarded to the Executive Director, this sentence was changed to read, 'LTV's improved financial circumstances were not the primary basis for the recommendation that the plans be restored.' " Pet. App. 110a-111a (citations omitted).

In addition, the PBGC's Notice of Restoration was based on insufficient data. The PBGC's estimates of LTV Corp.'s and LTV Steel's operating income rested on actual operating income results for only the *first five months of 1987*. Considering the magnitude of the restored obligations, the court of appeals correctly concluded that "five months is too short a period of time to determine an income trend." *Id.* at 1019. However, the PBGC now has several years of operating results at LTV Steel on which to base projections, and the PBGC is in an ideal position to assemble an appropriate record relating to financial affordability if, in fact, it can be established. *See* Brief *Amicus Curiae* of Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation, and USX Corporation at 18-22.

The district court and the court of appeals properly vacated the Notice of Restoration and remanded the restoration issue to the PBGC for further consideration on a more developed factual record.

II. IN THE CONTEXT OF A BANKRUPTCY REORGANIZATION CASE, IT IS THE EXCLUSIVE RESPONSIBILITY OF THE APPROPRIATE COURT, NOT THE PBGC, TO HARMONIZE ERISA WITH OTHER FEDERAL STATUTES AND POLICIES BY INTEGRATING RESTORATION OF PREVIOUSLY TERMINATED PENSION PLANS, IF POSSIBLE, INTO A FEASIBLE PLAN OF REORGANIZATION PURSUANT TO STANDARDS PRESCRIBED BY CONGRESS IN ERISA §4041(c)(2)(B)(ii).

The court of appeals recognized that "[a]lthough this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight." Pet. App. 16a. It also correctly held that restoration of a terminated pension plan, when the plan sponsor is a debtor in the process of reorganizing under Chapter 11 of the Bankruptcy Code, cannot be effectuated without considering the competing policies of federal laws other than ERISA.

Both the PBGC and the Solicitor General concede that ERISA §4041(c)(2)(B)(ii) embodies Congress' harmonization of ERISA and the Bankruptcy Code. PBGC Br. at 43; U.S. Br. at 21-22. Under §4041(c)(2)(B)(ii), the court must ultimately determine the status of the pension plan within the context of formulating a plan of reorganization. Although that statutory provision establishes the paramount importance of bankruptcy reorganization, it also represents Congress' judgment that pension plans shall not be terminated and shall continue, unless the bankruptcy court makes a finding that, without termination, a debtor will not be able to pay all its debts as restructured pursuant to a plan of reorganization and will be unable to continue in business outside the Chapter 11 reorganization process. Thus,

where the PBGC has determined to restore, if the court can identify a confirmable reorganization plan which incorporates restoration of the pension plans, it must confirm that plan over alternative plans which do not include the restored plans.

Congress, in ERISA §4041(c)(2)(B)(ii), specifically allocated the duty of performing any necessary harmonization of the goals of ERISA and of the bankruptcy law to the "*appropriate court*. . . ." Thus, Congress has specifically stated that the PBGC is not the appropriate entity to evaluate and reconcile these competing federal policies. The PBGC has neither the statutory authority, nor the expertise to take into consideration competing non-ERISA federal policies.

The PBGC, a government corporation created under ERISA to further the goals of ERISA, cannot be faulted for "focusing inordinately on ERISA." Pet. App. 17a.

A. The Goals And Policies Of ERISA Must Be Harmonized With The Bankruptcy Code Chapter 11 Goals And Policies Of Rehabilitation And Reorganization Of The Debtor.

The PBGC asserts that this case does not involve the potential conflict between federal statutes or policies and does not require harmonization. However, the PBGC's position that ERISA §4047 and the policies of ERISA require a court to accept the PBGC's restoration of millions of dollars of annual pension funding obligations on a debtor in the process of reorganizing, regardless of whether the court concludes that restoration will

promote the goal of reorganization, directly frustrates the bankruptcy policy in favor of reorganization and cannot be squared with any set of rational objectives.

Bankruptcy policy favors reorganization and equitable treatment of claims. As this Court explained in *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.,* 294 U.S. 648, 676 (1935), a reorganization proceeding "is not an ordinary proceeding in bankruptcy." The Bankruptcy Code expresses congressional preference for reorganization over liquidation to permit a debtor to "continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News pp. 5787, 5963, 6179. *See NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources"); *Matter of A & B Heating & Air Conditioning,* 823 F.2d 462, 465 (11th Cir. 1987) (Bankruptcy Code "expresses a preference toward reorganization rather than liquidation"). In this context, these important purposes cannot be ignored.

In *Bildisco,* the Court stated, in dealing with conflicting provisions and policies of the National Labor Relations Act and the Bankruptcy Code:

> [T]he Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, *but rather only how the equities relate to the success of the reorganization.*

Id. at 527.

The policy of ERISA, on the other hand, clearly favors continuation of pension plans. The statute, as amended, provides for the PBGC's assumption of pension obligations only in exceptional circumstances. In the 1986 amendments to ERISA, Congress declared that the policy of Title IV of ERISA was to encourage "the maintenance and growth of single-employer defined benefit pension plans" and to provide "for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system *only in cases of severe hardship. . . .*" SEPPAA §11002, 29 U.S.C. §1001b (Supp. IV 1986).

The Court has consistently held that when a competing federal statutory scheme is implicated in a bankruptcy proceeding, the goals and policies of the Bankruptcy Code must be harmonized with the goals and policies of other statutory schemes. *See Midlantic National Bank v. New Jersey Dept. Of Environmental Protection.*, 474 U.S. 494 (1986); *N.L.R.B. v. Bildisco & Bildisco,* 465 U.S. 513 (1984).

In *Midlantic,* this Court addressed whether section 554(a) of the Bankruptcy Code, 11 U.S.C. §554(a), "authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety." *Id.* at 496. This Court refused to read the bankruptcy statute to override all other concerns and held that nonbankruptcy considerations of health and safety

may not be ignored. The Court relied not only on the specific state health and safety statutes invoked by the litigants, but also on "repeated congressional emphasis on its 'goal of protecting the environment against toxic pollution.'" *Id.* at 505 (citing *Chemical Mfrs. Assoc., Inc. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 143 (1985)). It found these policies embodied in other federal statutes, such as the Comprehensive Environmental Response, Compensation, and Liability Act. 42 U.S.C. §9606 *et seq.* Likewise, although a court must recognize reorganization as the paramount goal, it must also effectuate the policies of ERISA to the extent possible.

In *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513 (1984), the debtor-in-possession asserted that the explicit terms of 11 U.S.C. §365(a) allowed it to reject a collective bargaining agreement and that the judicial standard for reviewing the rejection should be the same as for all other executory contracts. The Court acknowledged that "there is no indication in §365 of the Bankruptcy Code that rejection of collective-bargaining agreements should be governed by a standard different from that governing other executory contracts. . . ." *Id.* at 523. However, the Court adopted a higher standard, allowing rejection only "*if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.*" Id. at 526.[18] In formulating this standard,

[18] In response to *Bildisco*, Congress in 1984 enacted 11 U.S.C. §1113, which provides a special mechanism and procedure when a Chapter 11 debtor seeks to modify its obligations under or reject a collective bargaining agreement. Terminating a pension plan when to do so violates the terms of a collective bargaining agreement is subject to the procedure. Therefore, unilateral refusal to fund the pension plan should not be permitted. *See* 11 U.S.C. §1113(f).

the Court explicitly recognized the need to harmonize the "national labor policies of avoiding labor strife and encouraging collective bargaining" with "the policy of Chapter 11. . .to permit successful rehabilitation of debtors. . . ." *Id.* at 526-27. *See also In re Energy Resources Co., Inc.*, 871 F.2d 223 (1st Cir. 1989), *cert. granted*, 110 S. Ct. 402 (1989) (involving conflicting policies of Bankruptcy Code and Internal Revenue Code).

As a result of the interpretation of ERISA adopted by the PBGC, the restoration issue has brought ERISA and the Bankruptcy Code into conflict and harmonization is required here.

B. Pension Plan Restoration Determinations Made By The PBGC Must Be Evaluated Against And Balanced With The Paramount Goal Of Bankruptcy Reorganization.

Chapter 11 of the Bankruptcy Code affords a financially troubled business an opportunity to restructure its finances to enable it to continue its operations. To that goal, Chapter 11 enables a debtor to remain in control of its assets and business while negotiating a restructuring of its affairs. 11 U.S.C. §1107. The Bankruptcy Code provides an orderly process for a debtor to negotiate with its creditors and interest holders in a central forum along with a set of rules and procedures for administration of a Chapter 11 case. A fundamental objective of Chapter 11 is to promote and foster fully negotiated consensual plans of reorganization. *See, e.g., In re Texas Extrusion Corp.*, 68 Bankr. 712, 718 (N.D. Tex 1986); *In re American*

Solar King Corp., 90 Bankr. 808, 825, n.33 (Bankr. W.D. Tex. 1988); *In re Pub. Serv. Co. of New Hampshire*, 88 Bankr. 521, 539-40 (Bankr. D. N.H. 1988); *In re UNR Indus., Inc.*, 72 Bankr. 789, 792-93 (Bankr. N.D. Ill. 1987); *In re Jartran, Inc.*, 44 Bankr. 331, 363 (Bankr. N.D. Ill. 1984).

Congress has incorporated within Chapter 11 of the Bankruptcy Code a number of mechanisms which afford restructuring opportunities to a debtor and to creditors and interest holders. These mechanisms have potential impact on each constituency, as well as on others who have contractual relationships with the debtor. The bankruptcy laws contemplate a balancing of the interests of debtors, creditors, employees, and the public. *See Pepper v. Litton*, 308 U.S. 295 (1939). Often, these mechanisms are brought into play during the course of a bankruptcy reorganization case to provide interim relief to the debtor in the process of reorganization, and to protect other parties whose private contractual rights are being affected.

When a plan sponsor is a debtor attempting to reorganize under Chapter 11, the status of its pension plan (*i.e.*, terminated or ongoing) must be carefully integrated into the fragile and complex process of formulating an effective plan of reorganization.[19] This method of harmonization

[19] The Bankruptcy Code contains explicit provisions dealing with the contents of a plan of reorganization, the process leading to implementation of those plans and the actual implementation. A plan of reorganization must classify claims and interest, specify any classes of claims or interests that are not impaired, specify the treatment of impaired classes, provide the same treatment for each claim or interest of a particular class, provide adequate means for the plan's implementation, provide for certain charter changes when the debtor is a corporation, and contain provisions pertaining

comports with Congress' explicit intent as expressed in ERISA §4041(c)(2)(B)(ii), and properly accommodates the competing goals of Chapter 11 of the Bankruptcy Code and Title IV of ERISA.

In §4041(c)(2)(B)(ii) of ERISA, Congress set forth the standard and established the priorities for harmonizing the conflicts that arise among competing federal policies concerning the status of pension plans in the context of a Chapter 11 reorganization. In this section, Congress clearly declared its strong preference that pension plans continue. Under ERISA §4041(c)(2)(B)(ii), a plan of reorganization must provide for the continuation of an ongoing pension plan after confirmation unless the debtor can establish that reorganization is impossible without a distress termination. The statute provides that the bankruptcy court may approve the termination *only* if it finds that "unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in

to the selection of officers, directors, trustees, and their successors. 11 U.S.C. §1123(a). The plan of reorganization may also include other provisions that are not inconsistent with applicable provisions of the Bankruptcy Code. 11 U.S.C. §1123(b).

A plan of reorganization must be accepted by requisite numbers of creditors (11 U.S.C. §1126) after a court approved disclosure of "adequate information" is transmitted to all creditors and interest holders. 11 U.S.C. §1125.

Then, if the plan of reorganization is accepted, the court, after notice, holds a hearing on confirmation of the plan (11 U.S.C. §1128), and the court confirms the plan if it meets the statutory requirements, including a requirement that the plan of reorganization be feasible and is not likely to be followed by liquidation. 11 U.S.C. §1129. Confirmation of the plan of reorganization binds all parties, and, unless the plan provides otherwise, confirmation of the plan of reorganization discharges the debtor from all debts and vests all property of the estate back in the debtor. 11 U.S.C. §1141.

business outside the Chapter 11 reorganization process. . . ." 29 U.S.C. §1341(c)(2)(B)(ii). In this section Congress "tried to balance the need to limit access to the insurance system to cases of genuine need against *the danger of making the tests so stringent that nothing short of total liquidation would qualify for PBGC assistance.*" H.R. Rep. No. 241, 99th Cong., 1st Sess., pt. 2, at 49 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 707.

The PBGC concedes that the test set forth in ERISA §4041(c)(2)(B)(ii) is Congress' own harmonization of ERISA and bankruptcy law. *See* PBGC Br. at 43. The Solicitor General likewise admits that in this section, "Congress has itself harmonized ERISA . . . and the Bankruptcy Code." U.S. Brief at 21. As the government explains, a debtor-initiated termination "may be permitted only when necessary for an employer to stay in business." *Id.* at 22. Although the PBGC pays lip service to the standards Congress prescribed for harmonizing ERISA and the Bankruptcy Code, it nevertheless asserts that restoration can be accomplished without consideration of bankruptcy policy, ignoring the very harmonization that it admits Congress intended. These positions cannot be reconciled.

Section 4041(c)(2)(B)(ii) illustrates Congress' intent that a pension plan normally "ride through" the reorganization. Pension plan termination should be the exception. In like manner, undoing the termination – in this case restoration – should be implemented when it will not defeat a reorganization. The paramount importance of reorganization is also illustrated in other ERISA

provisions. Section 514(d) of ERISA, 29 U.S.C. §1144(d), for instance, provides that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law." Courts, including the courts below in this case, consistently find that this section evinces Congress' intent that the "Bankruptcy Code [be] effective over any ERISA provision to the contrary." *In re Goff,* 706 F.2d 574, 587 (5th Cir. 1983). *See In re Silldorff,* 96 Bankr. 859, 863 (Bankr. C.D. Ill. 1989); *In re Pulaski Highway Express, Inc.,* 41 Bankr. 305, 309-10 (Bankr. M.D. Tenn. 1984); *In re Baviello,* 12 Bankr. 412, 417 (Bankr. E.D. N.Y. 1981).[20]

The primacy of the bankruptcy policy in favor of reorganization is also reflected in both §§1123(a) and 1142(a) of the Bankruptcy Code, which govern the content and implementation of a reorganization plan. These sections begin with the preamble "*[n]otwithstanding any otherwise applicable nonbankruptcy law.* . . ." 11 U.S.C. §§1123(a) and 1142(a). Section 1123(a) provides that the reorganization plan shall, *inter alia,* designate classes of claims and specify if they are impaired and "provide adequate means for the plan's implementation." Section 1123(b), which is explicitly subject

---

[20] Although the PBGC suggests that §514(d) does not apply because it only applies to title I of ERISA and §4047 is in title IV, it is clear that the policies of ERISA upon which the PBGC relies to interpret §4047 are contained in title I of ERISA. *See* 29 U.S.C. §§1001, 1001b (Supp. IV 1986). Thus, both the district court and the court of appeals were plainly correct in rejecting the hypertechnical argument the PBGC now makes and in giving effect to Congress' manifest intention.

to subsection (a), also allows certain other provisions to be contained in a plan of reorganization including "any other appropriate provision not inconsistent with the applicable provisions of [title 11]."

Similarly, §1142(a) of the Bankruptcy Code provides that "[n]otwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court." 11 U.S.C. §1142(a).

To allow the PBGC itself to implement restoration of the Plans, without some consideration being given to the effect restoration will have on the prospects for a successful reorganization, would contravene other well-established bankruptcy principles, as well. It would be, in effect, to allow the PBGC to dictate the terms of the reorganization. The lower courts have consistently rejected as impermissible such efforts by interested parties in a bankruptcy. *See In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983); *In re DRW Property Co.*, 54 Bankr. 489, 497 (Bankr. N.D. Texas 1985); *In re Beker Indus. Corp.*, 64 Bankr. 900, 906 (Bankr. S.D.N.Y. 1986), *rev'd on other grounds*, 89 Bankr. 336 (S.D.N.Y. 1988); *In re Fremont Battery Co.*, 73 Bankr. 277, 279 (Bankr. N.D. Ohio 1987). The courts have refused to permit parties to take action that would severely hamper the ability of the debtor to reorganize or would have dictated the contents of a plan of reorganization. Actions which have the effect of constraining the terms of a future plan of reorganization are not permitted without giving

to creditors the protections of the plan procedures – procedures which involve, at the very least, disclosure and voting rights.

Although the strong policies favoring continuation of pension plans must be accommodated in the reorganization process, the court must stop short of restoring a plan when to do so will prevent reorganization, force a liquidation and thus frustrate the goals of all the relevant statutes. The court must therefore implement restoration only when the integrity of the reorganization process and the ultimate success of a plan of reorganization will not be jeopardized.

Regardless of the conclusions the Court may reach on the other issues, it is respectfully submitted that it would be appropriate in this complex matter for the Court in its disposition to provide guidance with respect to subsequent proceedings and to direct further consideration of the question whether restoration of the three Plans, if otherwise appropriate, would make the Debtors' successful reorganization impossible.

C. The PBGC Has Neither The Statutory Authority Nor The Expertise To Conduct The Detailed Analysis Of Competing Interests Necessary To Harmonize ERISA With The Federal Bankruptcy Laws And To Apply The Federal Pension Laws In The Bankruptcy Reorganization Context.

The court of appeals suggested that the PBGC was the appropriate entity to harmonize ERISA policies and other federal law policies in determining whether to restore a terminated pension plan to a plan sponsor attempting to reorganize in Chapter 11. Pet. App. 17a. However, according to the explicit terms of ERISA §4041(c)(2)(B)(ii), only the "*appropriate court*" is authorized to perform

such harmonization. The *"court"* determines whether termination of the plan is required to allow the debtors to pay their debts pursuant to a plan of reorganization and continue in business outside the Chapter 11 reorganization process. *Id.* The PBGC is clearly *not* authorized to harmonize competing federal statutes.[21] As the PBGC itself correctly argues (PBGC Br. at 40), the explicit, unambiguous terms of ERISA §4047 *limit* the PBGC's authority to a determination that restoration is "appropriate and consistent with [the PBGC's] duties under [ERISA]." Thus, Congress has given the PBGC no authority to consider the policies to be fostered by statutes other than ERISA.

Beyond its lack of statutory authority, the PBGC also lacks the expertise required to evaluate the non-ERISA reorganization concerns that are present when restoration must be evaluated in the context of a Chapter 11 case. Unlike the district court or a bankruptcy judge, the PBGC has no experience that would qualify it to evaluate the competing claims advanced by the Debtors, by creditor constituencies, by equity holders and by employees. The PBGC's range of concerns is narrowly circumscribed by §4002(a) of ERISA and is strictly limited to pension concerns.[22] Congress

---

[21] The procedure advocated by the Parent Creditors' Committee would apply in those instances where restoration of the Plans cannot be accomplished by agreement.

[22] Even if the PBGC were to attempt to integrate non-ERISA concerns into a restoration determination, its conclusions on these issues would be entitled to no deference, and the reviewing court would be required to apply a *de novo* standard of review. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) ("While the [NLRB]'s interpretation of the NLRA should be given some deference, the

never intended to delegate authority to the PBGC to harmonize conflicting federal statutes or policies.[23]

The district courts, subject to full appellate review of their conclusions, are the appropriate courts to balance the policies of competing federal statutes, as Congress recognized when it enacted ERISA §4041, 29 U.S.C. §1341.[24]

D. Implementation Of A PBGC Restoration Determination Requires Court Approval And A Court Order.

Requiring court approval for restoration under the foregoing analysis also eliminates the inconsistency inherent in allowing the PBGC unilaterally to restore a pension plan where an existing court order declares the plans to be terminated.

ERISA confers *"exclusive"* jurisdiction over a plan and its property on the federal court in which the PBGC brings its suit for termination. ERISA §4042(f), 29 U.S.C. §1342(f). As applied here, §4042(f) conferred exclusive jurisdiction over the Plans

---

proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress' intent in passing the Bankruptcy Code").

[23] The PBGC's financial interest in the restoration decision creates a potential source of bias that raises a serious question whether the PBGC possesses the impartiality that is necessary in a body entrusted with the responsibility for the delicate task of harmonizing the competing statutory policies implicated by restoration. The PBGC can hardly be expected to afford the competing interests of other creditors, who may have no interest in seeing pensions preserved, the same degree of concern as its own pension-focused and statutorily mandated interests. This is particularly true in this case where a restoration, followed by retermination, might increase the PBGC's bankruptcy claims by $800 million.

[24] The district courts have broad powers to refer to the bankruptcy courts issues appropriately to be addressed by the bankruptcy courts in the first instance. *See* 28 U.S.C. §157(a).

and their property on the district court when PBGC brought the three earlier suits on claims of termination. The consent decrees terminating the Plans thus constituted binding adjudications of the status of the Plans by the court with exclusive jurisdiction.

The fact that the decrees of termination were consent decrees makes them no less binding upon the PBGC. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). A consent judgment, like any other judgment, has continuing effect, although a party may always request a modification if there is a change in circumstances. *Mayberry v. Maroney*, 529 F.2d 332, 335 (3d Cir. 1976); *Rhem v. Malcolm*, 432 F. Supp. 769, 780 (S.D.N.Y. 1977); *see also* Fed. R. Civ. P. 60(b)(5).

The earlier decrees of termination entered by the district court remained in full force and effect, and a restoration of the Plans could not properly occur until those decrees were vacated.[25] The

---

[25] The legislative history of SEPPAA indicates that Congress never intended the PBGC to have unfettered discretion to restore a terminated plan without court approval. As the district court noted in a footnote, the language of the SEPPAA amendments to ERISA suggest "*that Congress recognized that the decision on restoration should rest with the appropriate adjudicative entity, government agency or court in cases of challenges by third parties to the propriety of a proposed voluntary plan of termination, and that the PBGC is not the appropriate decision-maker.*" The court referred to the House Committee Report:

> The Committee recognizes that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual or statutory rights of any affected parties. Rather this determination must ultimately rest with the appropriate adjudicative entity, government agency, or court, as the case may be. Furthermore, the decision on what the appropriate remedy should be if the termination is found to have been improper (and specifically, *whether or not the plan should be*

PBGC's restoration determination, if self-executing, would be nothing less than an administrative reversal of a district court order. The PBGC cannot unilaterally undermine the order of a court of competent jurisdiction. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950) (the FTC "cannot intrude upon or usurp the court's function of adjudication"); *United States v. Waters*, 133 U.S. 208 (1890) (attorney general cannot alter district attorney's fees which were determined by district court acting in its judicial capacity, nor is determination subject to revision or reversal by the attorney general); *United States v. O'Grady*, 89 U.S. (22 Wall) 641 (1875).

The PBGC was required to apply to the district court to substitute for its termination order an order restoring the Plans. Such an order is governed by the standards set forth in §4041(c)(2)(B)(ii).

E. The District Courts Possess The Flexible Power, In Appropriate Cases, To Make An Interim Decision To Give Effect To Restoration Of A Pension Plan Prior To Confirmation Of A Plan Of Reorganization.

If the PBGC determines, based exclusively on ERISA considerations, that restoration is appropriate, and applies, as it is required to do, to the

---

> *restored*) also rests with the appropriate adjudicative entity, government agency or court.

H.R.Rep. No. 300, 99th Cong., 2d Sess. 293, *reprinted in* 1986 U.S. Code Cong. & Admin. News 42, 944 (emphasis added); *In re Chateaugay Corp.*, 87 Bankr. 779, 809 n.25 (S.D.N.Y. 1988). *See also Coit Indep. Joint Venture v. Federal Savings & Loan Ins. Corp.*, 109 S. Ct. 1361, 1369 (1989) (finding that Congress did not grant FSLIC adjudicative authority over creditors' claims against insolvent savings and loan association); *FDIC v. Jenkins*, 888 F.2d 1537 (11th Cir. 1989).

district court that had entered the order approving termination, the district court may determine that a plan of reorganization providing for continuation of the Plans after confirmation is possible. If the district court so determines, the termination order should be vacated, and the court is required to give effect to the PBGC's restoration determination.

If the court can make an interim decision that restoration will not prevent the debtor from continuing to operate, will not prevent an equitable distribution to creditors, and will not substantially impede a successful reorganization, it may be appropriate for the court to order restoration even prior to the confirmation of a reorganization plan.

If the court were unable to conclude that reorganization with restoration is possible, the plan at issue would not be restored at that time. However, the statutory scheme still allows adequate flexibility. If it is premature for the court to determine at that stage whether restoration would make reorganization impossible, the court has the power to defer the decision to restore or terminate until such time as it can make that determination. The court also possesses the power to order interim measures to ensure that rights of interested parties are not prejudiced. It may order interim funding of the plan benefits on a pay-as-you-go basis until the issues are ripe for final decision.[26] Therefore, any decision to postpone the determination as premature and the attendant delay need not seriously jeopardize the rights of any parties. And,

[26] The provisions of the Bankruptcy Code also grant the court sufficient flexibility to integrate restoration into the process, either in the long run plan, *or*, on an immediate basis.

to avoid unnecessary delay, the court has ample power to accelerate the case (*e.g.*, by terminating or shortening the period of exclusivity). *See, e.g.*, 11 U.S.C. §1121; *In re Public Service Co. of New Hampshire*, 99 Bankr. 155 (Bankr. D. N.H. 1989) (refusing to extend exclusivity period); *see also In re Timbers of Inwood Forest Assoc., Ltd.*, 808 F.2d 363, 373 (5th Cir. 1987), *aff'd*, 484 U.S. 365, 375-76 (1988).

III. CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals affirming the district court's vacation of the Notice of Restoration and remanding to the PBGC should be affirmed. However, on remand the PBGC should make its restoration determination based only on ERISA-related factors. If, after remand and on an adequate administrative record, the PBGC again determines that restoration is warranted, the effect of restoration on the Debtors' ability to reorganize must be considered, in a second step, by the appropriate court before any restoration determination can be implemented.

Respectfully submitted,

WILLIAM H. ROBERTS
(Counsel of Record)

RAYMOND L. SHAPIRO
THOMAS E. BIRON
WILLIAM E. TAYLOR, III
ANN B. LAUPHEIMER

BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500
Attorneys for the Official Parent Creditors' Committee of The LTV Corporation

Dated: January 16, 1990